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Supreme Court of the United States

APRIL TERM, 1963

No. 956

JOHN G. MacMULLEN, PETITIONER,

versus

SOUTH CAROLINA ELECTRIC & GAS COMPANY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SOUTH CAROLINA ELECTRIC & GAS COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 7th, 1963.

OPINIONS BELOW

The opinion of the District Court (App. 13) is reported in 205 F. Supp. 811.

The opinion of the Court of Appeals (App. 20) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7th, 1963 (App. 20). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether question that the Electric Company was entitled to immunity of South Carolina Statute was a fact to be decided by District Court or matter of law for Court of Appeals under decision of this Court.

2. Whether under Rule 52(a) of the Federal Rules of Civil Procedure the Federal Appellate Courts may make an independent choice of inferences from undisputed facts.

3. Whether the Federal Appellate Courts may disregard the provisions of Rule 52(a) of the Federal Rules of Civil Procedure when the issues are presented by written rather than oral evidence.

4. Whether under Federal law a party is without remedy when a Circuit Court of Appeals makes clearly erroneous findings of fact and applies improper standards of law.

STATEMENT

Petitioner, an employee of Trans-Weigh, Inc., and a resident of the State of Pennsylvania, brought suit against the respondent, a South Carolina corporation, to recover damages for the negligence of respondent in causing and allowing a rheostat at the respondent Power Company's plant site to become energized with electricity while petitioner was in contact therewith. The result was that petitioner received severe and permanent injuries.

The respondent answered with a general denial, plus three affirmative defenses that (1) petitioner was a "statutory employee" of the respondent under the South Carolina Workmen's Compensation Law, which provides the sole

remedy, that (2) petitioner was contributorily negligent and that (3) petitioner assumed the risks involved. The District Court Judge without a jury held that the State Workmen's Compensation Law did not apply in this case. The Court also held that the petitioner's injuries were caused by the negligence of the respondent and that petitioner was not guilty of contributory negligence, nor had he assumed any risks. The District Judge ordered judgment for the petitioner in the amount of Seventy-five Thousand ($75,000.00) Dollars. The amount of the judgment is not in question.

The respondent appealed to the Court below, which found that construction of new plants was part of the usual trade and business of respondent, and that the petitioner was in the course and scope of employment with the respondent when injured. The Court then ordered that the judgment of the District Court be reversed and the action be dismissed.

A new steam generating plant was being constructed near Columbia, South Carolina, for the respondent under the direction of Gilbert Associates, Inc., who made a purchase order contract with the Fairfield Engineering Company to furnish and install continuous automatic coal handling equipment at an approximate cost of Three Hundred and Seventy Thousand ($370,000.00) Dollars. Fairfield Company, in turn, subcontracted to Trans-Weigh Company, the petitioner's employer, to furnish and calibrate a belt meter (an electronic scale) at a cost of approximately Thirty-three Hundred ($3,300.00) Dollars. Both the testimony and in the documentary evidence show that the petitioner had completed his job at the plant site to calibrate the belt meter furnished by petitioner's employer, and at the time of injury was in contact with a piece of equip-

ment which was not furnished by his Company and which he was not employed or obligated to service.

The record also shows that respondent had never on its own constructed a steam generating plant and had neither the facilities nor the personnel to plan and carry out the construction of a new plant.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided a Federal question in direct conflict with applicable decision of this Court.

The decision here violated is *Byrd v. Blue Ridge Electric Cooperative*, 2 L. Ed. (2d) 953, 356 U. S. 525. Byrd was injured while engaged in work involving new construction of the electric company's substation. His employer was under contract to the electric company which claimed immunity under the South Carolina Workmen's Compensation Law. The ju verdict was for plaintiff. However, the Fourth Circuit Court of Appeals reversed the judgment and ordered the case dismissed. This Court reversed the Court below and remanded the case for further proceedings. The key issue decided was that the ultimate fact of "statutory employment" was for trial court and not appeal court to determine as an issue of fact and not of law.

The facts in the case at bar weigh more heavily in petitioner's favor than in the *Byrd case, supra;* yet, the Court of Appeals decided again that plaintiff was a "statutory employee" as a matter of law, citing freely from *Byrd v. Blue Ridge Electric Cooperative* 238 F. (2d) 346, which was reversed by this Court. The Court below found as a matter of law that the petitioner was sent to Columbia, South Carolina, to put the entire transfer system into operation, whereas petitioner testified that he was only to service Trans-Weigh equipment. Also the contract (defendant's Exhibit "M") made on the day of petitioner's de-

parture to the plant site provided for an engineer to install "Trans-Weigh scale". This finding placed the petitioner in the course and scope of employment with respondent, without which finding there could be no defense under the State Compensation Act.

That the *Byrd case, supra,* was "jury" and this case "non-jury" does not change the issue. The issue is whether the Court below may usurp duties and powers of the District Court and disregard the decision of this Court. The substantive law to be applied is not in dispute. This Court has decreed that fact finding on this specific issue under the Federal Law is the function of the trial Court. The Court below seems unimpressed.

II. **There is a conflict among the Circuits on the issues presented.**

The Court below in considering appeals from the District Court is bound by Rule 52(a) of the Federal Rules of Civil Procedure which provides that findings of fact by the trial Court "shall not be set aside unless clearly erroneous. * * *" The Court below stated: "But that rule, by interpretation, is subject to exception and modification." The Court below further referred to "uncontroverted evidence" and "essentially undisputed facts".

The issue is (1) whether under Rule 52(a) the Federal appellate courts may or may not make independent choice of inferences from undisputed facts and (2) whether the Federal appellate courts may disregard the provisions of Rule 52(a) when the issues are presented by written rather than oral evidence.

Some of the Circuits hold that the findings of a trial Judge sitting without a jury may not be set aside unless clearly erroneous, whether the testimony is oral, written, or both, and whether the Court makes findings of fact or deduces inferences from established facts.

Other Circuits hold that when the evidence is undisputed, or when the issue is one of inferences to be drawn, the appellate courts have much broader powers of review than on disputed facts.

The conflict is pointed out in the recent case of *Lundgren v. Freeman*, 307 F. (2d) 104, 9th C. C. A., June 27, 1962. The Court said:

> "There seems to be considerable confusion as to whether Rule 52(a) allows an appellate court to disregard a trial court's findings where fact issues are decided on written evidence alone, so that appellate court is as able to determine credibility as the trial court."

In addition to the Fourth Circuit those Circuits favoring "broad review" when dealing with undisputed facts or with inferences drawn from facts are:

2nd Circuit—*Orvis v. Higgins*, 180 F. (2d) 537;
Ill. Cent. Ry. Co. v. Gulf M. & O. Ry. Co., 308 F. (2d) 374;
5th Circuit—*Mayo v. Pioneer Bank*, 297 F. (2d) 392;
8th Circuit—*U. S. v. Kavanaugh*, 308 F. (2d) 824.

Those Circuits holding that Rule 52(a) governs appellate review whether on disputed or undisputed facts or on inferences drawn from facts are:

6th Circuit—*Elyria-Lorrain Co. v. Lorrain Journal*, 298 F. (2d) 356;
7th Circuit—*Snodgrass v. Sears*, 275 F. (2d) 691;
9th Circuit—*Lundgren v. Freeman, supra;*
10th Circuit—*Widney v. U. S.*, 178 F. (2d) 880.

Judge Clark, who drafted Rule 52(a), seems to adopt the view that the Rule does mean something even where undisputed evidence is involved in appellate review. 5 Moore 2642, Fn. 22. This Court, in *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, strongly suggests that the Clark view is the correct one.

The two opposing views among the Circuits cannot be reconciled. In the interest of justice this Court should decide which view is correct, so as to bring about a consistency and uniformity in the administration of justice under the Federal law.

The lesser accepted theory applying "broad review" has been applied in this case, resulting in an injustice to petitioner.

III. **The Lower Court's usurpation of powers from a District Court is so manifest as to demand intervention and supervision by this Court.**

The Fourth Circuit Court of Appeals consistently "over-reviews" cases in which claimants receive substantial judgments in personal injury or wrongful death actions. This course is tenaciously pursued despite the admonitions of this Court.

In *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, this Court reversed the Fourth Circuit Court of Appeals for ordering entry of judgment for the defendant in a wrongful death case under the Federal Employers' Liability Act, saying:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

A new trial was had in the District Court pursuant to the above decision, and the plaintiff was awarded a verdict in the amount of $22,500.00, which was reversed by the Fourth Circuit Court of Appeals. In *Tiller v. Atlantic Coast Line R. Co.*, 323 U. S. 574, this Court reversed the decision of the Court below, and reinstated the verdict in the District Court. It was found that the Court below erred in

holding as a matter of law that the negligence of the defendant was not a proximate cause of Tiller's death.

In *Virginia R. Co. v. Armentrout*, 166 F. (2d) 400 (1948), a thirteen-month-old child lost both hands and part of both arms. A $100,000.00 verdict was reversed in the Fourth Circuit Court of Appeals for errors of law; then a $160,000.00 verdict was set aside as being grossly excessive.

In *Neese v. Southern Ry. Co.*, 350 U. S. 77, this Court reversed the action of the Fourth Circuit Court of Appeals in setting aside a judgment for wrongful death under the Federal Employers' Liability Act in the amount of $50,000.00 as being grossly excessive.

In *Bennett and Shealy v. Atlantic Coast Line R. Co.*, 251 F. (2d) 934 (1958) the Fourth Circuit Court of Appeals ordered remittitur of $10,000.00 punitive damages in each case on grounds not raised in the trial Court.

In *Miller v. East Georgia Motors*, 303 F. (2d) 408 (1962) the Fourth Circuit Court of Appeals set aside judgments in two cases involving substantial injuries for error in the District Court for accepting plaintiff's evidence as true.

In *Byrd v. Blue Ridge Electric Cooperative*, 356 U. S. 525, this Court reversed the Fourth Circuit Court of Appeals which had set aside a substantial verdict upon its finding as a matter of law that Byrd was a "statutory employee" of the defendant.

In *MacMullen v. South Carolina Electric and Gas Company*, the case at bar, the Fourth Circuit Court of Appeals reversed judgment for $75,000.00 and ordered that the case be dismissed, upon its finding as a matter of law that MacMullen was a "statutory employee" of the defendant. In this case the Court below seeks to apply the doctrine of *U. S. v. Parke Davis & Co.*, 362 U. S. 29, which holds that

Rule 52(a) does not apply when the trial Court did not apply "proper standards to essentially undisputed facts". It is submitted that the Court below committed clear error by applying the standard of *U. S. v. Parke Davis, supra,* rather than the correct standard set forth in *Byrd v. Blue Ridge, supra.*

This Court should intervene in order to bring about uniformity in the administration of Federal Courts and in the interest of justice.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT IN THE DISTRICT COURT

FINDINGS OF FACT

1. The defendant, South Carolina Electric and Gas Company, in June of 1958, was in the process of having constructed a new steam generating plant for the manufacture of electricity near Irmo, South Carolina, known as McMeekin Station, under the general supervision, direction and planning of Gilbert Associates, Inc., of Reading, Pennsylvania.

Gilbert Associates, Inc., consultants for the defendant, on November 27, 1956, made a purchase order contract with Fairfield Engineering Company for the furnishing and installation of continuous automatic coal handling equipment at this Station in the amount of $367,062.00. (Ex. R.) This equipment made up a system whereby coal was handled and transferred in several phases from railroad cars into the generating plant. Fairfield Engineering Company, specialists in supplying and installing automatic transfer systems for various products, including coal, made a sub-contract with Trans-Weigh Company, of Pennsylvania, to supply and furnish an engineer to install, adjust, calibrate and instruct defendant's personnel in the use of electronic weighing and measuring equipment that would weigh coal as it passed through the coal handling system for less than $3,000.00. (Ex. L.) Trans-Weigh Company specializes in supplying, installing and calibrating electronic weighing equipment.

The plaintiff, John G. MacMullen, an employee of Trans-Weigh Company, went to the McMeekin Station on the morning of June 11, 1958, for the purpose of adjusting, calibrating and instructing company personnel in the use of the coal weighing equipment.

2. On the morning of June 13, 1958, the plaintiff had completed his work on the weighing equipment supplied by his employer, Trans-Weigh Company, and had placed the equipment in proper operation.

Some equipment supplied by a company other than Trans-Weigh Company that was a part of the coal transfer system was defective, and the plaintiff was asked by an

agent of the defendant on duty at the McMeekin Station whether he was familiar with the defective equipment, and whether he could correct the existing defects. The plaintiff informed this agent that he was familiar with the type of equipment involved and that he could correct the defects, but that this was not equipment of his company, and that he did not wish to work on equipment of another company. In view of the fact that an engineer from the other company could not be brought to the site within a short time, the plaintiff was prevailed upon to repair the defective equipment. Plaintiff consented to repair the equipment upon three conditions: (1) that the defendant agree to furnish all necessary material; (2) that the defendant furnish the necessary personnel to do certain work involved; and (3) that the defendant would de-energize and keep the flow of electric current from the equipment involved while plaintiff worked on it. These conditions were agreed to by Engineer M. C. Johnson, who was supervisor of relays and controls for the defendant at the McMeekin Station.

3. The defective equipment consisted of a system of potentiometers and a drive motor located inside the plant building, and more particularly located inside a metal cabinet approximately 21″ x 21″ x 29″ in size. The defendant assigned two employees, one an electrician and the other a mechanic, to work with the plaintiff in reparing and adjusting the defective equipment. Some preliminary work was done in the morning of June 13, 1958, toward preparing certain equipment and materials for installation in the cabinet. After lunch, at approximately 12:30 P. M., the plaintiff was informed that the electricity had been turned off and that the equipment to be adjusted had been de-energized. The mechanic, L. M. Shealy, installed some brackets inside the metal cabinet as instructed by the plaintiff and did work in the cabinet for a period of approximately fifteen to twenty minutes. The plaintiff then undertook to make the necessary adjustments to the equipment inside the cabinet, and had been so occupied for perhaps five minutes when suddenly he received an electric shock. The mechanic, L. M. Shealy, upon observing that plaintiff had received a shock, and that plaintiff's arms and hands were in contact with the equip-

ment, touched the plaintiff with the back of his hand to ascertain whether any current was flowing from plaintiff, and Shealy found that he received no electric voltage by touching the plaintiff. Mr. Shealy then attempted to pull the plaintiff loose from the equipment but was unable to do so, at which time the electrician, A. C. Turkett, came to Mr. Shealy's assistance, and the two of them were able to dislodge the plaintiff from the equipment. The plaintiff was at that time drawn up and was not breathing and mucus was flowing from his mouth. The plaintiff was revived by means of artificial respiration given by Mr. Shealy, and was taken to a doctor's office in a nearby town for treatment. The plaintiff, after visiting this physician, returned to the plant site, and then went to the airport in Columbia and returned to his home in Pennsylvania by airplane.

The defendant, through its employees, had control of the switches which allowed and regulated the flow of electricity into the equipment which was being repaired. The plaintiff was not familiar with the various circuit control systems within the plant or the main control center inside the plant which controlled the flow of energy into the equipment on which he was working. There was no necessity for having electric current running through the equipment at the time plaintiff received his injury. The plaintiff had ascertained by checking certain dial indicators that the equipment was de-energized before he began his work on the equipment.

On the day that plaintiff was injured, and prior thereto, the McMeekin Station had been put in partial operation, and the coal transfer system had been operated manually by turning the necessary switches on and off, in view of the fact that the electronic equipment which operates the system automatically had not been adjusted and calibrated.

4. I find that the defendant, South Carolina Electric and Gas Company, was negligent, through its agents, servants and employees, in causing or allowing the equipment on which the plaintiff was working to be energized without notice to the plaintiff while he was in the act of making adjustments to the equipment. I find that the defendant was negligent in not taking precautionary steps to prevent the

electric current from being turned on while plaintiff was working on the equipment.

5. I find that the plaintiff requested the proper supervisory personnel of the defendant to shut off the flow of electric current into the equipment involved and to prevent the equipment from becoming re-energized until he had completed his work, and that he was assured by defendant's agent that this would be done. The plaintiff checked certain dial indicators to ascertain that the current had actually been turned off on the equipment. I find, therefore, that the plaintiff was not contributorily negligent in bringing about his own injury. He could not do the work and at the same time watch the switches.

6. In view of the fact that the plaintiff took the necessary action to remove any risk that he might be injured while working on the equipment involved, I find that he did not assume the risk and hazard of working on the equipment, and would not, therefore, be precluded from recovery by any assumption of risk. There is no evidence which suggests that plaintiff had any reason to suspect that electric current would be on the equipment with which he was to work.

7. I find that plaintiff was not engaged in performing a part of the trade, business or occupation of the defendant; that the plaintiff was not a statutory employee of the defendant, and that his recovery and remedy are, therefore, not limited by the South Carolina Workmen's Compensation law.

The overall planning and construction of the steam generating plant at Irmo, South Carolina, was under the direction and supervision of Gilbert Associates, Inc. The entire operation of furnishing and installing the automatic coal handling system was contracted to the Fairfield Engineering Company who are specialists in this field. The defendant has never undertaken on its own the planning and construction of a steam generating plant. The defendant has never done its own installation of a coal handling system at any station. The defendant has never undertaken to manufacture, install and put into operation an automatic electronic coal weighing system. This is a very specialized

field, and, according to the evidence, there are only three companies other than Trans-Weigh Company in the United States that supply, install and calibrate coal weighing equipment. I find from the evidence that the defendant had neither the facilities nor the personnel to plan and carry out the construction of a steam generating plant, and especially that the defendant had neither the facilities nor the personnel to construct, install and put into operation an automatic coal handling system, and that neither of these undertakings are part of the usual trade, business and occupation of the defendant. It is true that according to the charter under which the defendant operates it would have the power and authority to enter into the business of constructing electric generating plants and the various components thereof. However, the record shows that the defendant has not entered the business of constructing electric generating plants nor of installing automotic coal handling equipment, either independently or as a component part of other construction work. As to the actual trade, business and occupation in which the defendant is engaged, the Certificate of the South Carolina Industrial Commission offered in evidence by the defendant as to employers' compliance with the Workmen's Compensation law certifies that the South Carolina Electric and Gas Company is "engaged in the business of operation, purchase, transmission, distribution sale of electric energy and manufacturing gas". (Ex.T) The contention of the defendant, therefore, that the plaintiff's sole remedy is under the Workmen's Compensation law is without merit.

8. Plaintiff was thirty-three years of age at the time of his injury, and at the time of the trial his life expectancy, according to the South Carolina mortality table, was 33.44 years. Prior to the injuries suffered his health was good and in addition to his work he engaged in a number of recreational activities. Plaintiff has had surgery performed on both his arms in an attempt to restore some of the functional use of the arms that was lost as a result of the electrical shock. He has permanent disability of between sixty-five and seventy-five percent in both of his arms. He has a general bodily disability of approximately sixty-five percent. He is disabled from doing manual labor and his abili-

ties to work in a supervisory nature have been greatly limited. The prognosis for the future is grave. He has been caused to endure a great deal of pain, and has suffered extensive and permanent bodily disfigurement. His ability to engage in recreational and social activities is practically nil because of his physical condition. His working years, even in a limited capacity, have been shortened by approximately fifteen years. His earning capacity prior to his injury and at present in his limited supervisory position is Nine Thousand ($9,000.00) Dollars. According to the evidence I find that he will suffer a great loss of earning capacity. There is strong probability that he will not be able to work past the age fifty. This future loss, of course, should be reduced to present day value in assessing damages. The reduced value of the dollar should also be kept in mind. I find that the plaintiff has incurred extensive medical expense and most probably will continue to incur substantial medical bills in the future.

9. Plaintiff's employment status with the defendant at the time of his complained of injuries could have been no more than that of a "casual employee". He had never done like work for the defendant before and there is nothing in the evidence to indicate that either the plaintiff or the defendant contemplated that such a relation would continue in the future.

10. From the foregoing I find that the plaintiff has suffered damages by reason of the negligence of the defendant in the sum of Seventy-five Thousand ($75,000.00) Dollars.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. The rights and duties of the parties are governed by the laws of the State of South Carolina, the place where the injuries to the plaintiff occurred.

3. Negligence is the failure to do what a reasonably prudent person would have done under the same or like circumstances, or it is the doing of something which an ordinarily prudent person would not have done under the same or like circumstances. *Jones v. American Fidelity and Casualty*

Company, 210 S. C. 470, 43 S. E. (2d) 355; *Benedict v. Mark Shows*, 178 S. C. 169, 182 S. E. 299. Otherwise stated, negligence is the failure to use due care, or it is the failure of a person to use that degree of care which a person of ordinary intelligence and ordinary prudence reasonably would be expected to use in a situation with which he is confronted. *Lundy v. Southern Bell Tel. and Tel. Co.*, 90 S. C. 25, 72 S. E. 558.

4. A person who is injured while working for another is not limited to relief provided in the Workmen's Compensation law of South Carolina if he was not engaged in work which was a part of the usual trade, business or occupation of his employer. *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825; *Bard v. Blue Ridge Rural Electric Coop.*, 2 L. Ed. (2d) 953, 356 U. S. 525.

5. Plaintiff as a casual employee of defendant on the occasion in question is not entitled to the benefits of the Workmen's Compensation law nor is the defendant entitled to its protection. *Jolly v. Atlantic Greyhound Corp.*, 207 S. C. 1, 35 S. E. (2d) 42.

6. Applying the principles of law applicable to the case, I conclude that the injuries and damages sustained by plaintiff were directly and proximately caused by the negligence of the defendant.

7. The plaintiff was not contributorily negligent nor did he assume the risk or hazard of the work under the facts of this case.

The plaintiff is entitled to recover from the defendant the sum of Seventy-five Thousand ($75,000.00) Dollars and the costs of this action.

It is so ORDERED.

This 20th day of December, 1961.

s/ GEORGE BELL TIMMERMAN,
United States District Judge.

DECISION OF COURT OF APPEALS FOR FOURTH CIRCUIT REVERSING CASE AND ORDERING CASE DISMISSED

BOREMAN, Circuit Judge:

John G. MacMullen, the plaintiff below, brought this action against South Carolina Electric & Gas Company to recover for personal injuries sustained by MacMullen, alleged to have been caused by defendant's negligence while he was working on electrical equipment designed to control automatic coal-loading apparatus being installed as a part of defendant's newly constructed steam power generating plant at McMeekin Station, Irmo, South Carolina. Defendant interposed the defenses necessary to raise the questions presented at the trial. The case was tried before the District Court without a jury and MacMullen was awarded $75,000 in damages. The court found that the work in which plaintiff was engaged was not a part of the trade, business or occupation of the defendant; that MacMullen was no more than a "casual employee" of defendant and was not limited to recovery under the provisions of the South Carolina Workmen's Compensation Law; that the defendant was negligent in allowing the equipment to become electrically energized while MacMullen was working on it; that MacMullen was not contributorily negligent and did not assume the risk and hazard of the work involved. On this appeal defendant challenges each of the court's findings and conclusions. We are of the opinion that the case is controlled by the South Carolina Workmen's Compensation Law which provides an exclusive remedy for MacMullen.

The first issue to be determined is whether the plaintiff was a "statutory employee" of defendant under the South Carolina Workmen's Compensation law* (hereinafter referred to as the Act or Compensation Act) and thus precluded from maintaining this common law negligence action. That Act provides (1) that when an "owner" undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with another

* Code of Laws of South Carolina (1952) §§ 72-1 through 72-504.

to perform some part or all of the work, the owner shall be liable to pay any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by the owner (Section 72-111); (2) that the owner has the same liability to the employees of a subcontractor of the contractor (Section 72-113); and (3) that the statutory employee to whom the owner is liable under the Act cannot be a mere "casual employee" (Sections 72-11 and 72-107).

MacMullen was not regularly employed directly by the electric company. In determining whether he was a "statutory employee," pertinent are the following questions: Was MacMullen employed by a subcontractor of a contractor with defendant? Was he performing work which was "in the trade, business, or occupation" of defendant? Was he a mere "casual employee" of defendant under the Act?

The District Judge's findings of fact and conclusions are found as reported in *MacMullen v. South Carolina Electric & Gas Co.*, 205 F. Supp. 811. We do not disagree with the learned trial judge in his somewhat abbreviated statement of the historical facts. However, we believe that some amplification of those facts will be helpful in considering the issues and applying the South Carolina law. To that end we have examined the record and find uncontroverted evidence which shows the facts which are hereinafter stated in more detail. Many of these facts were developed in response to questions propounded directly to the witnesses by the trial judge.

The defendant is in the business of producing, distributing and selling electric power in South Carolina. Since the time of incorporation in 1924, although there was a change in corporate name in 1937 and the defendant merged with another corporation in 1943, the defendant's corporate charter has authorized and empowered it to *construct*, use and operate plants, systems, or parts thereof, for the production, use, distribution and sale of electricity. Some of defendant's employees have been engaged more or less continuously since 1949 in construction of new power generating facilities which were later put into service as

part of defendant's power producing and distributing system or that of a subsidiary corporation. Plants constructed or acquired and completed by the defendant for its own use were Plant Hagood at Charleston, South Carolina, completed in 1952; McMeekin Station near Irmo, South Carolina, completed in 1959; Canady's Station at Canadys, South Carolina, commenced in 1959 and still under construction at the time of the trial below. In addition, defendant's personnel were similarly active in the construction of Urquhart Station at Beech Island, South Carolina, completed about 1956 for South Carolina Generating Company, defendant's subsidiary.

MacMullen's injury occurred on June 13, 1958, and during the last phase of construction of McMeekin Station. It is clear that there was no general contract let by the defendant for the construction of the McMeekin Station and the other new plants mentioned. There was an apparent, though unsuccessful, effort on plaintiff's behalf to show the Gilbert Associates, Inc., of Reading, Pennsylvania, was a prime contractor for such construction, but an examination of the record reveals that the true relationship between the defendant and Gilbert Associates arose following a written proposal submitted by the latter in 1950. Although the defendant did not sign and return the proposal as provided by its terms, oral acceptance by the defendant and repeated demands for services resulted in an effective working relationship under an engineering service contract. A division of functions between defendant and Gilbert Associates was carried out in practice over the period of eight to ten years during the building of the Urquhart, McMeekin and Canadys installations, and Gilbert Associates was employed to do engineering design work and to co-ordinate activities of defendant's personnel and various contractors at the job sites. A letter of July 15, 1955, from defendant authorized Gilbert Associates to proceed with engineering on the McMeekin Station.

It was shown by the evidence that defendant's functions at McMeekin Station were to own and manage the property on which the facility was being constructed, to outline its

general requirements, to prepare specific designs for certain parts of the facility, to approve engineering plans and specifications, to provide supervisory personnel (such as an electrical supervisor, a field assistant, a general foreman and warehousemen) reporting to the general construction superintendent, to supply work crews consisting wholly of defendant's own employees, including both laborers and skilled craftsmen, for carrying out various parts of the project not contracted to outsiders, and to provide general assistance in contacting subcontractors and in co-ordinating their activities. Defendant's own employees were used extensively in constructing foundations, providing services such as furnishing compressed air at the work site, warehousing and handling of construction materials and erecting specialized machinery (for example, steam turbines and condensers) under supervision of manufacturers' representatives. On the other hand, Gilbert Associates prepared most of the detailed drawings and specifications for McMeekin Station, submitted them to defendant's chief engineer for approval, worked closely with defendant in all phases of designing, signed contracts with the various contractors "as agents for" defendant and provided a general superintendent with an assistant to generally co-ordinate the construction of the plant on the job site. Positions of foremen, general construction workers and skilled workers were never filled by Gilbert Associates' personnel and defendant had up to two hundred men employed in these activities. Mr. Crews, the general superintendent supplied by Gilbert Associates at McMeekin Station, described his job as "consulting" and "co-ordinating" at the job site.

On November 27, 1956, Fairfield Engineering Company, of Marion, Ohio, obtained a contract to furnish and install the continuous automatic coal-handling system for defendant at McMeekin Station. The contract was signed on defendant's behalf by Gilbert Associates "as agents for" defendant. In May 1957 Trans-Weigh Company, Wayne, Pennsylvania, subcontracted with Fairfield to provide, for less than $3,000, the design of a weighing and control system for the coal-handling apparatus and

most of the components of this system, including a Leeds & Northrup electronic controller; to approve and warrant the compatibility of a Jeffrey Manufacturing Company feeder with motor driven rheostats being supplied directly to the job site by Fairfield; to furnish the services of its field engineer at $50 per day to install, adjust and calibrate the weighing equipment and to instruct defendant's personnel in the operation and use of the equipment.

MacMullen, a full-time employee of Trans-Weigh with considerable experience as a field engineer for that company, was assigned to the McMeekin Station job pursuant to Trans-Weigh's subcontract with Fairfield. He flew from Philadelphia, Pennsylvania on June 10, 1958, and reported at McMeekin Station the following day. After working for two days, while checking out the weighing equipment on the morning of June 13, 1958, assisted by one of defendant's employees, MacMullen discovered that a part of the apparatus, supplied by Jeffrey Manufacturing Company and installed by Fairfield, was not functioning properly as a part of the automatic weighing and control system. He undertook to replace a small item of electrical apparatus, in the Jeffrey equipment, obtained a substitute for the apparatus and had mounting brackets installed by defendant's mechanic. While attempting to complete alignment of the new equipment, he received a severe electric shock which caused his injuries. On the same day, after treatment, MacMullen returned to Philadelphia.

Was construction of McMeekin Station part of the trade, business or occupation of defendant?

The courts of South Carolina have been called upon to interpret that state's Compensation Act. In the leading case of *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825 (1939), the power company was in the business of generating and distributing electricity which from time to time required the erection of poles and transmission lines. In furtherance of its business purposes it contracted with an outsider to paint 170 metal poles. One of the contractor's workmen was injured while doing the work and sued the power company in a common law neg-

ligence action. It was held that the suit could not be maintained because the workman was injured while engaged in work while was "a part of the trade, business or occupation" of the defendant power company, and that the worker's only remedy was under the Workmen's Compensation Statute which relieved the power company of common law liability. The court also recognized the difficulty of laying down general rules for determining whether the work in a given case falls within the designation of the Act saying, 190 S. C. at ....., 2 S. E. (2d) at 885, "* * * It is in each case largely a question of degree and of fact. * * *."

The *Marchbanks* decision was amplified in *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878 (1940), where, in execution of a contract between the owner of a cloth manufacturing mill and an independent contractor for the painting of a tank maintained by the mill for fire protection, an employee of the independent contractor was killed by an unexplained explosion of the tank. A claim against the mill for workmen's compensation was resisted on the ground that the workman was not an employee of the mill and that the painting of the tank was not part of its trade or business because the work was of such dangerous and unusual character that it was never done by the regular employees of the mill and was always let by contract to an experienced steeplejack. But the court held the mill liable under the Workmen's Compensation Act because the tank was an integral part of the mill business providing fire protection particularly necessary and essential in the cloth manufacturing business, and, therefore the painting of the tank was a part of the trade, business or occupation of the mill.

In the more recent case of *Bell v. South Carolina Electric & Gas Co.*, 234 S. C. 577, 109 S. E. (2d) 441 (1959), the court sustained the power company's demurrer to the plaintiff's negligence complaint and held as a matter of law that the power company was the deceased workman's statutory employer. Plaintiff's intestate was killed while employed by a contractor who was transferring lines of the power company from one set of poles to another. The

court said, 234 S. C. at ....., 109 S. E. (2d) at 442: "The defendant Power Company is a public utility engaged in the manufacture and transmission of electricity and uses poles and wires in its business and the repair and maintenance of such poles and wires or the transferring of such from one set of poles to another are part of its business, trade and occupation."

Other South Carolina cases which have held the employee of a contractor or subcontractor to be a "statutory employee" engaged "in the trade, business, or occupation" of the owner include *Kennerly v. Ocmulgee Lumber Co.*, 206 S. C. 481, 34 S. E. (2d) 792 (1945), (employee of logging contractor for a sawmill company injured on company's timberlands while the contractor was cutting logs under general supervision of the company, the employee working under contractor's directions); *Hopkins v. Darlington Veneer Co.*, 208 S. C. 307, 38 S. E. (2d) 4 (1946), (employee of logging contractor for a veneer company injured while cutting company-owned logs under supervision of contractor); *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566 (1957), (employee of contractor operating millinery department in owner's store injured on store stairway).

Another South Carolina case applying the same principles to hold the employee of a subcontractor to be a "statutory employee" of the general contractor because performing work directly related to that undertaken by the general contractor is *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. (2d) 681 (1941), (employee of paving contractor killed in highway accident while procuring and transporting equipment to be used in paving work.)

This court had occasion to examine and review the South Carolina law on this subject in its first consideration of *Blue Ridge Rural Electric Cooperative v. Byrd*, 238 F. (2d) 346 (4th Cir. 1956). The *Byrd case* was reversed by the Supreme Court of the United States and remanded for further proceedings on grounds which did not affect this court's construction of the Compensation Act, 356 U. S. 525 (1958), and it was further remanded by this court to the District Court (264 F. (2d) 689, 4th Cir. 1958) to allow

the presentation of certain evidence to the jury in accordance with the Supreme Court's decision. In *Byrd* the Electric Cooperative was in the business of selling and distributing electric power to rural areas. Byrd's immediate employer contracted to construct new electric transmission and distribution lines, convert existing lines, and construct two appurtenant substations and a breaker station. Byrd was injured while working on power lines to one of the new substations. In holding this work to be within the trade, business, or occupation of Blue Ridge Cooperative, this court, speaking through Judge Soper, stated, 238 F. (2d) at 351:

> "* * * the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection."

After analyzing the *Marchibanks* and *Boseman* decisions and citing other South Carolina cases, the court continued, 238 F. (2d) at 353:

> "The appellee seeks to distinguish some of these cases on the ground that in them the injured man was engaged in maintenance work ordinarily performed by the employees of the owner in the operation of the business; but it is manifest that it would defeat the purpose of the Act to make the prime mover of an enterprise liable to pay compensation for injuries suffered in the work of maintenance or repair, whether he is negligent or not, but to exempt him in the more important and more extensive field of new construction. For the same reason, it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction

work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that § 72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution *'of the whole or any part of the work.'* Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated."

* * *

"It cannot be denied that Blue Ridge was vitally concerned in the construction of the equipment covered by the Bouligny contract, without which the distribution of its product would have been impossible."

The District Court found and referred to certain facts, obviously accepting them as controlling, on the issue of whether the work being done by Fairfield and Trans-Weigh was a part of the "usual trade, business and occupation" of the defendant.*

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* In 205 F. Supp. 811, at 814, the District Court stated a combination of findings and conclusion as follows:

"The overall planning and construction of the steam generating plant at Irmo, South Carolina, was under the direction and supervision of Gilbert Associates, Inc. The entire operation of furnishing and installing the automatic coal handling system was contracted to the Fairfield Engineering Company who are specialists in this field. The defendant has never undertaken on its own the planning and construction of a steam generating plant. The defendant has never done its own installation of a coal handling system at any station. The defendant has never undertaken to manufacture, install and put into operation an automatic electronic coal weighing system. This is a very specialized field, and, according to the evidence, there are only three companies other than Trans-Weigh Company in the United States that supply, install and calibrate coal weighing equipment. I find from the evidence that the defendant had neither the facilities nor the personnel to plan and carry out the construction of a steam generating plant, and especially that the defendant had neither the facilities nor the personnel to construct, install and put into operation an automatic coal handling system, and that neither of these undertakings are part of the usual trade, business and occupation of the defendant. It is true that according to the charter under which the defendant operates it would have the power and authority to enter into the business of constructing electric generating plants and the various components thereof. However, the record shows that the defendant has not entered the business of

Applying the Compensation Act as interpreted in the South Carolina cases and by this court, it is manifest that defendant was engaged "in the trade or business" of constructing new additions to its power-generating facilities in its construction of McMeekin Station and we are compelled to disagree with the contrary finding and conclusion of the District Court on this point. In the course of its business of producing, selling and distributing electricity, defendant had occasion to enlarge its power production facilities. It did so over a period of years and utilized its own personnel extensively in designing, supervising and in actual construction. At the McMeekin project, Fairfield was one of approximately twenty-five contractors from which defendant purchased materials and construction services. The coal-handling equipment to be furnished and installed by Fairfield was essential to supply the coal as fuel for production of steam and generation of electric power in defendant's plant. Those portions of the control system, instruments and services to be provided by Trans-Weigh were necessary to make automatic the operation of the coal-handling system as required by the specifications and contract. The basic purpose of the Compensation Act is the inclusion of employers and employees and not their exclusion.* This purpose would be defeated were we here to hold the Act applicable only to maintenance and repair and to exempt the employer in the more important field of new construction.*

Was MacMullen a casual employee of defendant?

The District Court found, 205 F. Supp. 811, at 815:

> "Plaintiff's employment status with the defendant at the time of his complained of injuries could have been no more than that of a 'casual employee.' He had never done like work for the defendant before and there is nothing in the evidence to indicate that either

constructing electric generating plants nor of installing automatic coal handling equipment, either independently or as a component part of other construction work.

* Hopkins v. Darlington Veneer Co., 208 S. C. 307, 38 S. E. (2d) 4 (1946).
* Blue Ridge Rural Electric Cooperative v. Byrd, 238 F. (2d) 346 (4th Cir. 1956).

> the plaintiff or the defendant contemplated that such a relation would continue in the future."

This finding was obviously the basis of the District Court's conclusion of law that MacMullen, as a "casual employee" of defendant, is not entitled to the benefits of the Compensation Act and the defendant is not entitled to its protection.

It is true, as noted by the District Court, that MacMullen testified it was not normal procedure for him to repair or replace equipment manufactured by companies other than Trans-Weigh and that, on the occasion of his injury, he did so only at the request of, and after certain assurances from, the defendant. Apparently the trial judge, relying upon this testimony, drew the inference that MacMullen, at the time he was injured, was working directly for the defendant on a casual basis and not in the course of his employment with Trans-Weigh. We again find ourselves in disagreement with the District Court.

Although our consideration of this question necessarily involves some repetition, we again turn to the evidence to explain the basis of our conclusion that the District Court was in error.

Trans-Weigh, Fairfield's subcontractor, proposed that it would furnish, at a stated price, equipment equivalent to that actually purchased by Fairfield from Jeffrey, or that Fairfield could purchase it directly from the manufacturer and supply the same as a part of the over-all control system and for Trans-Weigh's use in complying with the terms of its subcontract. Fairfield elected to and did purchase the equipment from Jeffrey but only upon receipt of Trans-Weigh's assurance and warranty of the equipment's compatibility with the other components of the control system, including the parts of the equipment to be furnished and installed by Trans-Weigh.

MacMullen acknowledged that he was quite familiar with the Jeffrey equipment since that equipment or its equivalent was included as a component part of most of the weighing and control systems installed or serviced by him. He agreed that the Jeffrey equipment had to work properly and compatibly with that furnished by Trans-

Weigh for the coal-handling system to function as a unit in the automatic control of the flow of coal into the plant.

Complying with that portion of the Contract Purchase Order requiring it to furnish operating instructions for the control system, Trans-Weigh provided an Instruction Manual. This pamphlet specifically shows the control system as comprising not only the units furnished by Trans-Weigh but also the vibrating feeder and motor-driven rheostat unit purchased from Jeffrey by Fairfield. Furthermore, every section, such as "Description of Operation," "Preliminary Checks" and "Trouble-Shooting," deals in as much detail with the Jeffrey equipment as that furnished by Trans-Weigh.

By its invoice of December 27, 1957, Trans-Weigh billed Fairfield for the system. The equipment was assembled at McMeekin Station and on June 10, 1958, Fairfield notified Trans-Weigh to send one of its engineers to install, check, calibrate and instruct in the operation and use of the system. On June 18, 1958, Trans-Weigh billed Fairfield for MacMullen's services including the time spent by him in modifying the Jeffrey unit.

By the terms of the documents in evidence, including the subcontract of Trans-Weigh, it is obvious that Trans-Weigh was to design the control system for the coal-handling system and, coincidentally, was to furnish certain of the individual units comprising it. Other units, of which the Jeffrey equipment was one, were purchased and supplied by Fairfield.

The design and operation of the system were of prime importance, not the furnishing of several of its individual components. The fact that one party furnished a portion of the equipment and the other party the remainder was purely a matter of agreement and convenience between them and had nothing to do with Trans-Weigh's responsibility to see that each individual unit was properly designed to perform, and did perform, its function in the over-all system. Indeed, Trans-Weigh's own instruction manual specifically refers to the interdependence of the various units in the system. This interdependence and the impossibility of checking one without checking all are

pointed up by the facts that, even after modification of the Jeffrey equipment, the control system still did not function properly until it was subsequently discovered that the amplifier, furnished by Trans-Weigh and claimed by MacMullen to have been checked and found to be in working order, was al[illegible]efective and was repaired or replaced. Significant as revealing Trans-Weigh's conception of its obligation under its subcontract to assure the proper operation of the entire control system, and as to whether MacMullen was working as a regular employee of Trans-Weigh or was employed directly by the defendant when he was injured, are the facts that Trans-Weigh paid MacMullen, billed Fairfield and was paid by Fairfield for the time plaintiff spent in modifying the Jeffrey equipment.

Clearly, Fairfield was responsible to defendant for the complete coal-handling system. It is equally clear that Trans-Weigh was responsible to Fairfield for the compatible operation of all units of the system and not, as asserted by plaintiff and found by the District Court, only for the individual units furnished by it. MacMullen was sent to McMeekin Station to put this system in operational order and it was while doing so that he was injured. The installation of the coal-handling equipment and the work necessary to put it in operation* were foreseeable within the normal course of defendant's trade, business or occupation of constructing electric generating plants for the production of electricity for transmission and sale. MacMullen was employed in furtherance of Trans-Weigh's obligation under its contract with Fairfield and Fairfield's obligation under its contract with defendant to install, check, calibrate and instruct defendant's employees in the operation and use of the coal-handling system. MacMullen was, therefore, "* * * doing something for the subcontractor which bore some reasonably direct relation to the performance 'of the work undertaken' by the contractor" and comes within the coverage of the Compensation Act. *Smith v. Fulmer*, 198 S. C. 91, ..., 15 S. E. (2d) 681.

* By its subcontract Trans-Weigh was required by Fairfield to carry Workmen's Compensation, Public Liability and Property Damage Insurance and provide a certificate of such coverage.

683 (1941). We cannot disregard the obvious fact that Trans-Weigh's interests and contractual obligations were directly advanced by MacMullen's services in attempting the modification and replacement of a part of the Jeffrey equipment to assure the functional operation of the control system. Even though MacMullen performed these services when, as the engineer and representative of Trans-Weigh on the job and in order to avoid unnecessary delay, he was requested by defendant to speed to completion the automatic operation of the control system, it does not follow that he thereby became a "casual employee" of the defendant so as to be precluded from the benefits of the Compensation Act.*

In reaching our decision we are not unmindful of that portion of Rule 52(a) of the Federal Rules of Civil Procedure which provides that findings of fact in actions tried before the court without a jury "shall not be set aside

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* In stating its conclusion that MacMullen, as a "casual employee" of defendant, was not entitled to the benefits of the Compensation Act, the trial court cited only Jolly v. Atlantic Greyhound Corporation, 207 S. C. 1, 35 S. E. (2d) 42 (1945). That case would support the trial court's conclusion only if there had first been a correct determination that MacMullen was a casual employee of defendant. But the Jolly case is so clearly distinguishable on its facts from the case at bar as to render it inapposite in determining the nature of MacMullen's services and the employer-employee relationship existing at the time of his injury.

Jolly was regularly employed by the owner of a rural store and cafe, where lodging also was furnished for sportsmen. The gasoline filling station operated by the owner of the establishment was incidental to the other offered services. No garage or automobile repair services were provided—not even changing or repairing tires. When an Atlantic Greyhound bus with motor inoperative, coasted to the gasoline pumps, Jolly undertook to pour gasoline from a can into the carburetor of the bus while the regular driver was attempting, from inside the bus, to start the motor. An explosion occurred and Jolly was injured. He contended that he was a "statutory employee" of the bus company under the Compensation Act and thus entitled to the benefits of the Act. The court, merely assuming but not deciding that claimant Jolly became an employee of the defendant bus company, held that he was no more than a casual employee. There the bus company was not a customer of Jolly's regular employer, there was no relationship of any kind between them and the service which Jolly was attempting to render was totally unforeseeable. The relationship of Jolly to the bus company came within the definition of "casual" quoted by the court: " 'Happening or coming to pass without design, and without being foreseen or expected; coming by chance; coming without regularity; occasional; incidental.' " 207 S. C. at , 35 S. E. (2d) at 47. By contrast, in the instant case the contractual relationships between the companies involved were by design and careful planning, and the furnishing of MacMullen's services by Trans-Weigh was foreseeable and necessary to discharge the obligations of his employer.

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." But that rule, by interpretation, is subject to exception and modification. In *United States v. Gypsum Co.*, 333 U. S. 364, 395 (1948), the Court held: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." We are left with that definite and firm conviction.

However, our decision need not be bottomed solely upon this ground. Here the District Court premised its ultimate findings (that the construction of the McMeekin Station was not a part of the trade, business or occupation of the defendant, and that MacMullen was no more than a "casual employee" of defendant) on its interpretation of the standards to be applied. Because of the nature of the District Court's error, we are here reviewing primarily questions of law, namely, whether the District Court applied the proper standards to essentially undisputed facts. We are of the opinion that the ultimate findings and conclusions below, with which we disagree, were based on an erroneous interpretation and application of the law.*

It has been held in South Carolina that an employee's inclusion within the provisions of the Compensation Act of that state as a "statutory employee" not only entitles him to the benefits of the Act but also renders the "owner" under the Act immune from action based on common law liability.*

We think MacMullen was not entitled to maintain this action. In view of our stated conclusions, it is unnecessary to consider the other findings below with respect to defendant's negligence, the absence of plaintiff's contributory negligence and assumption of risk.

Reversed and remanded with direction to dismiss.

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* See United States v. Parke, Davis & Co., 362 U. S. 29 (1960), particularly at pages 43-45.

* See Adams v. Davison-Paxon Comany, 230 S. C. 532, 96 S. E. (2d) 566 (1957); Marchbanks v. Duke Power Co., 190 S. C. 336, 2 S. E. (2d) 825 (1939).